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IN THE

Supreme Court

OF THE 1559

United States

OCTOBER TERM, 1970

CIPRIANO D. ALONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Cipriano D. Alonzo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment entered against him on March 9, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, annexed hereto. The order of the District Court for the Northern District

of California upholding the arrest and search below is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1971. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

Whether, in a Prosecution in Federal Court for a violation of the Federal Narcotics Laws, the Court may apply the more liberal State Entry Requirements because the actual entry was made by a State officer engaged in a joint Federal-State narcotics raid, rather than the stricter requirements imposed upon Federal officers by 18 U.S.C. 3109 and this Court's decision in *Sabbath* v. *United States*, 391 U.S. 585?

STATUTES INVOLVED

Section 3109 of Title 18, United States Code provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Section 844 of the California Penal Code states:

> To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

STATEMENT OF THE CASE

Federal, State, and local narcotics officers participated in a joint investigation concerning the petitioner and others. Leading up to the petitioner's arrest, the drugs were purchased by a *federal* undercover agent; were taken to the office of the *Federal* Narcotics Bureau for safekeeping; were examined by a *federal* chemist, who testified in the *federal* prosecution for a violation of the *federal* narcotics laws. Four other federal agents participated in the investigation, but the entry into petitioner's home was made by state and local officers. This was the entry which the Court below held was authorized by Section 844 of the Penal Code of the State of California, citing *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, *cert. denied*, 352 U.S. 858 (1956).

While the petitioner does not concede the correctness of the ruling that the entry and arrest were valid under state law, it is the broader ruling (and its implications) which we ask this Court to review.

REASONS FOR GRANTING THE WRIT

The Court of Appeals relied upon its prior decision in *Williams* v. *United States*, 273 F. 2d 781 (1959), wherein it was stated that:

> Since the activity of the officers which culminated in the return of the indictment was a joint federal-state enterprise, it is clear that the participation of federal officers makes the enterprise a federal one for purposes of prosecution for violations of federal law. *Lustig* v. *United States*, 1949, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819.
>
> 273 F. 2d at p. 790.

Notwithstanding this clear language, the Court applied California law to the arrest and entry, since the arrest was made by a state officer. In reaching this conclusion, the Court said:

> In the instant case, the federal narcotics agents participating in the enterprise did not exercise such authority [under 26 U.S.C.A. § 7607], but the arrest of Mrs. Williams was made by a state officer who was authorized to make such arrest by Section 844 of the Penal Code of the State of California. Since the enterprise was a federal one, the validity of the arrest must be measured by federal law if there is an applicable federal statute. If not, the validity of the arrest must be judged by state law.

* * * * *

> Our attention has been called to no applicable federal statute, although the government mildly suggests Title 26 § 7607. Clearly such statute gives authority to a federal narcotics agent to make an arrest without a warrant if he has reasonable ground to believe that the person to be arrested has committed or is committing violations of federal narcotics laws. The statute is silent as to the means or methods of making such arrests.
>
> 273 F. 2d, at p. 792

Obviously, the Court did not consider 18 U.S.C. § 3109 a federal law relating to "the means or methods of making such arrests". One authority has commented upon this problem:

> Interestingly enough, the Ninth Circuit has apparently handed down inconsistent decisions. In *Hopper* v. *United States* [267 F. 2d 904 (9 Cir. 1959)] and *Williams* v. *United States*, [273 F. 2d 781 (9 Cir. 1959)], Washington and California law were held respectively to govern the manner of entry in making an arrest. Both decisions explicitly referred to *Miller* [*Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190 (1958)] as District of Columbia law. However, in *Munoz* v. *United States*, [325 F. 2d 23 (9 Cir. 1963)], the court squarely held an arrest by federal agents without a warrant unlawful under section 3109 as interpreted by *Miller*.

Blakely, *The Rule of Announcement and Unlawful Entry: Miller* v. *United States and Ker* v. *California*, 112 Pa. L.R. 499, 527 (1964).

The Ninth Circuit was later to recognize the possible effect this Court's decision in *Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190, has upon the rule announced in *United States* v. *Di Re*, 332 U.S. 581, 68 S. Ct. 222 (1948) and followed in *Johnson* v. *United States*, 333 U.S. 10, 68 S. Ct. 367 (1948). In *Sabbath* v. *United States*, 380 F. 2d 108, 110, [reversed 391 U.S. 585] the Court said:

> It is not clear just what law sets the standards which govern an officer's entry into a dwelling for the purpose of making an arrest. When the arrest is made by a state officer for a federal offense, it has been said that the arrest is to be tested by the law of the state [*Miller* v. *United States* (cite), may cast some doubt upon this language even as to state officers. See the dissenting opinion. (note 4)]

In *Sabbath*, the Court of Appeals did apply 18 U.S.C. § 3109 as a "federal law relating to the means or methods of making such arrests" by virtue of this Court's decision in *Miller*, which it considered based upon section 3109. 380 F. 2d, at p. 111, note 7.

If then, joint federal-state enterprises are to be governed by federal law, the Court below erred in applying state standards, such as Penal Code § 844 as

enlarged by *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, *certiorari denied*, 352 U.S. 858, 77 S. Ct. 81 (1956). The test for the validity of the entry should be one of federal law, "neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed". *Elkins* v. *United States*, 364 U.S. 206, 224, 80 S. Ct. 1437, 1447 (1960).

This Court's decision in *Ker* v. *California*, 374 U.S. 23, 83 S. Ct. 1623 (1963), while dealing with a state's treatment of entries by state officers under state law, suggests the difficulties in the delicate area of federal-state cooperation, where it is difficult to anticipate whether state, federal or constitutional rules apply. If, as Justice Brennan suggested, unannounced police entries are governed by uniform Fourth Amendment standards, the states and the federal government can adjust their practices accordingly.

The importance of the question of unannounced entries cannot be minimized, especially in light of recent federal legislation permitting entries to execute search warrants in drug cases where probable cause is shown. Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513, 84 Stat. 1236, § 509(b). May state officers enlist the aid of a federal drug agent to procure a "no-knock" warrant, thereby evading stricter state standards? Does *Miller* impliedly extend § 509(b) to drug *arrests*, with or without warrants? Is § 509(b) a limitation on joint fed-

eral-state narcotics investigations? If, as the Court below held, in a joint federal-state enterprise, the entry is controlled by state law if a state officer makes the arrest, a "no-knock" warrant in the hands of a cooperating federal agent is worthless. [See an extensive discussion of the problems in *Announcement in Police Entries*, 80 Yale L.J. 139 (1970).]

The decision below was based upon a prior decision of the Ninth Circuit which is of questionable validity. The Court in *Williams* ignored the existence of 18 U.S.C. § 3109 as applied to entries to arrest. In the instant case, as in *Williams*, the investigation was primarily federal, with cooperation from state officers. The only significant step in the entire case, from initial contact until ultimate conviction, was the entry and arrest by state officers. If this Court's holding in *Lustig*, supra, has any vitality remaining, federal law must apply to this entry and arrest.

CONCLUSIONS

It is respectfully submitted that the judgment below is based upon the existing uncertainty of the law with respect to entries to arrest, resulting from this Court's decisions in *Miller* v. *United States*, supra, *Ker* v. *California*, supra, and *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). There is need for clarification in the area of state-federal enforcement, especially in light of current legislation and efforts at coordinating crime control through co-

operative programs at every level of government. It is imperative that the courts, and the enforcement personnel that must bring their cases before them, know with certainty which laws apply to a given situation. A sense of uncertainty permeates the decisions of the lower courts. The decision below adds to that uncertainty, and presents the vehicle for crystalization of a workable rule by this Court. For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Stanley P. Golde, one of the attorneys for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit as follows:

> Five copies upon Hon. Erwin Grisworld, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.
>
> Three copies upon James L. Browning, United States Attorney, 450 Golden Gate Avenue, San Francisco, California 94102.

All said copies were deposited in the United States mail at Oakland, California, with first class postage prepaid, addressed as above, this 1st day of April, 1971.

Dated this 1st day of April, 1971.

STANLEY P. GOLDE